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IN THE

Supreme Court of the United States

October Term, 1962

No. 663

JAMES R. CROWE and WALTER J. SARNITZ,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, James R. Crowe and Walter J. Sarnitz, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against them in the above entitled case on September 20, 1962.

A. The Opinion Below

The opinion of the Court of Appeals in this case has been officially reported in 308 F. 2d 537 (1962). It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on September 20, 1962. On October 16, 1962, a petition for rehearing thereof was denied by said court. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Was the petitioner Sarnitz questioned in an improper fashion?

2. Did said questioning, when combined with an inflammatory prosecutorial summation as to both petitioners, cumulatively constitute a deprivation of a fair trial?

D. Constitutional Provisions and Statutes

The Constitutional provisions and statutes involved are:

1. United States Constitution, Amendment V.

2. United States Code, Title 18, Sections 371 and 1343.

All of the foregoing are set forth in full in Appendix B annexed to this petition.

E. Summary Statement of Matters Involved

A four count indictment was returned against the petitioners alleging violations of the fraud by wire statute and conspiring to violate the same. (United States Code, Title 18, Section 1343 and 371 respectively.) They were found guilty as charged and thereafter sentenced to imprisonment; Crowe to four years and ten months and Sarnitz to four years and five months. Both petitioners have been released on bail.

F. Reasons for Granting the Writ

I.

The petitioner Sarnitz was cross-examined in such an inherently improper and and unfair fashion as to constitute a deprivation of a fair trial.

The United States Attorney, having a United States Military Government Court charge sheet before him, asked Sarnitz on cross-examination whether he had been charged with purchasing penicillin from American soldiers. The United States Attorney knew or should have known from the charge sheet in his very possession that Sarnitz had never been so charged. The very question was improper and prejudicial. To the contrary, the first count set forth in the charge sheet was simply and solely that of illegal possession of United States Government property.

The United States Attorney thereupon compounded the impropriety by pointedly asking Sarnitz whether the second count therein was a conspiracy to sell penicillin at black market prices. The Government knew, or should have known that the second count contained no reference to

either black market or black market prices, and that the questions could serve no purpose other than to degrade Sarnitz.

The continued lack of concern by the United States Attorney as to the true charges against Sarnitz was manifested when the Government alleged on Page 35 of its appellate brief that Sarnitz had been sentenced for selling penicillin stolen from United States Army supplies. Pointedly, neither the charge sheet nor the judgment of conviction contained any such allegation and the conduct of the United States Attorney at the trial was clearly violative of the precepts as to prosecutorial conduct set forth by the United States Supreme Court in *Berger* v. *United States*, 295 U. S. 78 (1935).

The Court of Appeals determined that since Sarnitz had denied having committed a crime, he could be cross-examined thereon. However, that holding in no way justified or sanctioned the conduct of the prosecutor in improperly and prejudicially querying Sarnitz as to whether he had been charged with purchasing penicillin from American soldiers. For the Government knew or should have known from the charge sheet in its possession that Sarnitz had never been so accused. Moreover, the additional question as to whether Sarnitz had been charged with conspiring to sell penicillin at black market prices, knowing that the second charge contained no reference to either black market or black market prices, was basically unfair.

The prejudice and basic impropriety that came into being as a result of Sarnitz being castigated as a convicted Austrian black marketeer, must be considered in light of

the fact that he had admitted, on direct examination to being a German soldier in World War II. He was thereafter castigated as an unpatriotic American by the United States Attorney in a summation which the Court of Appeals refused to sanction, and which it is submitted, was devastating in its cumulative effect.

II.

The prosecutorial summation was so inflammatory and prejudicial as to warrant a reversal.

The United States Attorney having succeeded, with the approval and adjudication of the Trial Court, in having Sarnitz depicted as a convicted Austrian black marketeer, thereafter pressed the issue of patriotism and national loyalty as to all the petitioners. Patriotism or lack of patriotism was not in issue at the case at bar. It was in no way introduced by the petitioners as a defense to their activities nor did they provoke the Government into bringing it into play. The United States Attorney was never called upon to permissibly parry any advocatory thrusts made by the petitioners. The duty of the United States Attorney was solely to argue for his client on the basis of evidence submitted at the trial. Yet, without further ado, the United States Attorney in his summation inferred that the petitioners were responsible for anti-American rioting in the streets of Latin America. In commenting upon their business activities, the United States Attorney said:

> "Well, all I can say in that regard—I won't dwell on it—if this is the way in which Americans down in Latin America do business offering close to $200,000,000 to corrupt politicians who would be taking the money of their own government which is so badly

> needed to raise the standard of living down in those countries, if that is the way that Americans—who by the way never go near the U. S. Embassy in the course of their dealings—if that's the way these Americans do business down in Latin American countries I think it is little wonder that we read in the papers these days of anti-American rioting in the streets down there."

Objection was promptly taken to this remark and overruled by the Trial Court. The effect of this comment in view of the deplorable activities of certain Latin American countries during recent times, and the existence of an unfriendly Cuba, was to infer that the petitioners were in some way responsible for these events. To say that they were not responsible meant nothing. For even if they were responsible, evidence of the responsibility as to those acts could in no way be brought into play in a trial alleging a violation of Title 81, Section 371 and 1343 of the United States Code.

The Court of Appeals, in its opinion, 308 F. 2d 537, at 542, in referring to but a portion of the aforequoted summation stated:

> "While we are not to be understood as sanctioning such latitudinous remarks, we do not believe that they were sufficiently prejudicial to require reversal."

It is submitted that the Court of Appeals erred in not realizing the effect of the prosecutorial impropriety in the questioning of the petitioner, Sarnitz. Which, when compounded with the wanton accusatien of lack of patriotism as to both petitioners, could have no effect other than to so prejudice the jury against them as to constitute a deprivation of a fair trial.

III.

The arguments presented in the petition for the granting of a writ of certiorari of the co-petitioner, Dinty Warmington Whiting, bearing No. 613 Misc. of this Court, are adopted on behalf of the petitioners, Crowe and Sarnitz, as though at length set forth.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
THEODORE KRIEGER
Attorneys for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 264—SEPTEMBER TERM, 1961

(Argued March 8, 1962 Decided September 20, 1962)

DOCKET NO. 27196

UNITED STATES OF AMERICA,

Appellee,

—v.—

DINTY WARMINGTON WHITING, JAMES R. CROWE and WALTER J. SARNITZ,

Defendants-Appellants.

Before:

WATERMAN, KAUFMAN and MARSHALL,

Circuit Judges.

Appeal from judgments of conviction entered by the United States District Court for the Southern District of New York, Charles M. Metzner, J., after trial by jury, for violations of 18 U. S. C. A. §§ 1343 and 371. Affirmed.

DAVID R. HYDE, Asst. United States Attorney, Southern District of New York (Robert M. Morgenthau, U. S. Attorney, So. District of New York, on the brief), for Appellee.

J. ROBERT LUNNEY, New York, N. Y., for Defendant-Appellant, Dinty Warmington Whiting.

THEODORE KRIEGER, New York, N. Y., (Albert J. Krieger, New York, N. Y., on the brief) for Defendants-Appellants, James R. Crowe and Walter J. Sarnitz.

MARSHALL, *Circuit Judge*:

This is an appeal by three defendants, Dinty Warmington Whiting, James R. Crowe, and Walter J. Sarnitz, from judgments of conviction entered in the United States District Court for the Southern District of New York, Metzner, J., on March 30, 1961, after a trial by jury. The three defendants were each convicted on three substantive counts (Counts I, II, and III) charging separate violations of 18 U. S. C. A. § 1343 by the sending of cables between New York and Rio de Janeiro in furtherance of a scheme to defraud. They were also convicted on a fourth count (Count IV) of conspiring to send these fraudulent cables in violation of 18 U. S. C. A. § 371, the federal conspiracy statute. The defendant Whiting was sentenced to serve four years and seven months in prison on each count, the defendant Crowe to serve four years and ten months in prison on each count, and the defendant Sarnitz to serve four years and five months in prison on each count, with the sentences of each defendant to run concurrently.

Two additional defendants, Lawrence J. Kunz and Victor J. Mari, pleaded guilty to Count IV and were each sentenced to serve one year in prison. Indictments against them as

to Counts I, II, and III were dismissed. At trial both men testified as Government witnesses.

Although the appellants make certain claims of erroneous and prejudicial rulings by the trial court, which will be considered presently, their appeal is based primarily upon the contention that the evidence presented by the Government did not fairly establish beyond a reasonable doubt their guilt of the crimes charged. We have carefully considered the record and find the evidence ample to support the judgment of the District Court. Because we find no merit to any of the other claims made by the defendants, the judgments of conviction must be affirmed.

On the basis of the evidence introduced by the Government, the jury could have found the following facts:

In August 1960 Sarnitz approached Mari and Kunz, both employees of the Bank of America-International in New York, with an offer of $125,000 for Mari and $250,000 for Kunz if they would send a cable from the Bank of America-International to the Banco do Brasil in Rio de Janeiro, using a confidential international banking cable code known only to a few employees of each bank, including Kunz. Both men accepted the offer. Meetings were held by Mari, Kunz, Sarnitz, and Crowe; Sarnitz made at least three telephone calls to Whiting in Rio de Janeiro. A cable—which originally named Whiting as beneficiary but later was changed to name Crowe—was drafted. Finally, on August 16, 1960, after Crowe had flown to Rio de Janeiro, Kunz transmitted over the Bank of America's wire to the Banco do Brasil the cable that forms the basis of Count I:

> WE HAVE RECEIVED PAYMENT ORDER VALUED AT US DOLLARS THREE MILLION FROM BANCO DI NAPOLI NEW YORK STOP UNDER INSTRUCTIONS OF JAMES RILEY CROWE AS BENEFICIARY THEREOF WE HEREBY TRANSFER AND CREDIT THIS PAYMENT ORDER TO YOUR ACCOUNT OR YOUR ASSIGNEE.

The message was repeated five times bearing the amount of $3,000,000. On a sixth message, the amount was changed to $5,000,000, making a total of $20,000,000.

When the Banco do Brasil received this cable, it sent a return cable to the Bank of America requesting confirmation. Later that same day Whiting went to the office of All America Cables and Radio in Rio de Janeiro and sent to the Bank of America in New York the cable which forms the basis of Count II:

DISREGARD AND CANCEL CABLE TODAY SATELGERAL RIO.

The term "SATELGERAL" is the cable code name for Banco do Brasil-General Management. On the line of the form requesting the name of the sender, Whiting wrote, "J. Feirrara & Cia, Av. Rio Branca 164." Both cables—the request for confirmation sent by Banco do Brasil and the "disregard and cancel" cable sent by Whiting—were given to the appropriate official in the Bank of America, but no action was taken. Sarnitz also talked to Whiting by telephone during this period.

The following day, August 17, 1960, Sarnitz received from Kunz the confidential banking test code number for that day as well as several secret cable code words; he then went to the Western Union office in the Waldorf-Astoria Hotel in New York and sent to the Banco do Brasil the telegram which forms the basis of Count III:

FIVETHREE SIX BSUUI WE CONFIRM PAYMENT ORDERS JAMES ILEY CROWE FROM AUGUST SIXTEENTH IN ALL PARTICULARS EXCEPT FINAL THREE WORDS IN ALL SIX MESSAGES QUOTE OR YOUR ASSIGNEES UNQUOTE WHICH ARE HEREBY DELETED XRUID.

The words "FIVETHREE SIX," "BSUUI," and "XRUID" were written in the secret bank code. On the line of the Western Union form requesting the name of the sender, Sarnitz wrote "Frederick Johnson, Hotel Gladstone, N. Y." When

this message was received, the Banco do Brasil again sent a cable to the Bank of America requesting confirmation. Upon receipt of that cable in New York, the Bank of America began an investigation. All five defendants were subsequently arrested.

To sustain these convictions there must be evidence from which the jury could conclude beyond a reasonable doubt (1) that the defendants devised a scheme to defraud the banks involved by means of false representations; (2) that they caused the communications listed in the indictment to be sent in interstate or foreign commerce for the purpose of executing the fraudulent scheme; and (3) that they acted as part of an illegal conspiracy.

The Count I cable sent by Kunz from the Bank of America to the Banco do Brasil was clearly false and fraudulent. It was sent without the knowledge of any authorized official of the Bank of America. The Banco di Napoli had not transmitted to the Bank of America the payment orders mentioned in the cable; the Bank of America had not received the payment orders mentioned and did not intend to transfer and credit them to the Banco do Brasil, and Crowe was not a customer of the Banco di Napoli or the Bank of America. Although no money was ever paid out to the defendants by the Banco do Brasil, the fact that a scheme to defraud fails of its purpose is not a defense. Hoffman v. United States, 249 F. 2d 338, 341 (9th Cir. 1957). And it should be noted that the comptroller of the Bank of America testified that in his opinion had the Banco do Brasil relied upon the Count I cable and paid out the funds, the Bank of America would have been held liable.

The Count II and Count III cables were similarly false and fraudulent. Although the Count II cable was signed by the cable code name meaning the Banco do Brasil, that Bank did not authorize its transmission and had no knowl-

edge that it was being sent. The Count III cable, although including secret cable code words, was sent, like the Count I cable, without the knowledge or authority of the Bank of America. And neither Whiting nor Sarnitz signed his real name on the cable form line asking the name of sender. Both cables were designed to prevent an investigation by the two banks involved.

The evidence as to all three defendants is clearly sufficient as to all the constituent elements of the crimes alleged, including knowledge and intent, to sustain their convictions. There was a substantial basis in the Government's evidence from which the jury could have found that Sarnitz was directly implicated in the bribe offered to Mari and Kunz, the fabrication of the Count I cable, and the fabrication and actual sending of the Count III cable. There was also substantial basis in the Government's evidence from which the jury could have found that Crowe was a part of the conspiracy from the beginning, that he met with Sarnitz, Kunz, and Mari in New York, and that he flew to Rio de Janeiro in order to become the "beneficiary" of the conspiratorial scheme.

Although the Government's case against Whiting is not as clear as that against Sarnitz and Crowe, there is nonetheless substantial evidence from which the jury could have inferred guilt. He admitted sending the Count II cable and although he claims he did not sign the name of the Banco do Brasil to it, the jury has resolved that contention against him. He was in telephone communication with Sarnitz during the final stages of the scheme. The complicated version of his actions in Brazil which Whiting made the basis of his defense was for the jury to accept or reject. We are satisfied that its rejection of Whiting's defense and its acceptance of the Government's version of the facts is based upon substantial evidence.

The defendant Whiting also contends on this appeal that it was error for the trial court to deny his successive motions, made under Rule 15 of the Federal Rules of Criminal Procedure, to take the depositions of five persons residing in Brazil. Rule 15 (a) provides that a court may order the taking of depositions upon a showing "that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice. * * * " Although the reported cases are not extensive, they are consistent in holding that a motion made under Rule 15 is addressed to the discretion of the trial court, Heflin v. United States, 223 F. 2d 371 (5th Cir. 1955); that it is to be granted only in "exceptional situations," United States v. Glessing, 11 F. R. D. 501 (D. Minn. 1951); and that the moving party has the burden of demonstrating the availability of the proposed witnesses and their willingness to appear, United States v. Ausmeier, 5 F. R. D. 395 (E. D. N. Y. 1946), the materiality of the testimony which it is expected they will give, United States v. Glessing, supra, and that injustice will result if the motion is denied, United States v. Grado, 154 F. Supp. 878 (W. D. Mo. 1957). It is within the discretion of the trial court to deny the motion if it is made after "unexcused delay," Heflin v. United States, supra, or on the "eve of trial," United States v. Broker, 246 F. 2d 328 (2nd Cir. 1957), cert. denied, 355 U. S. 837. The District Court was correct in holding that the motion and supplementary affidavits submitted by Whiting failed to meet these standards.

Counsel for Whiting moved on January 10, 1961 for an order authorizing the taking of the depositions of five persons residing in Brazil. Neither the motion nor the supplementary affidavit of January 18, 1961 did more than allege, in conclusory terms, the availability of the five proposed witnesses. Nor did either of these papers make a convincing

showing that the anticipated testimony of the proposed witnesses would be material to any defense available to Whiting. At the hearing on the motion on January 16, 1961, counsel for Whiting pressed his contention that at least one of the proposed witnesses could give testimony relevant to the Count II cable sent from Brazil to New York, but he declined to admit or deny that Whiting sent the cable, or to indicate what form Whiting's defense to the charge involving that cable would take. Consequently, he was unable to demonstrate that the proposed testimony would be material to or would help to establish Whiting's defense or that the proposed testimony "would tend to exonerate" him. United States v. Broker, supra at 329. The District Court properly characterized Whiting's papers at this stage as "vague and indefinite.

However, on February 14, 1961, the first day of trial, Whiting testified at a hearing on his motion for reduction of bail. During his testimony he admitted sending the Count II cable from Brazil to New York and conceded that it was in his own handwriting. His counsel then asked the court to reconsider his motion to take foreign depositions in the light of Whiting's testimony. The court noted that "Mr. Whiting testified for an hour and a half this morning and practically very little of what he said on the stand appeared in [his] papers * * * his papers nowhere give one-tenth of what he said on the stand today," even though counsel for Whiting had "known this information for two months." The court therefore denied the motion "at this time at 20 minutes after three on the opening day of trial." Under these circumstances it is unnecessary to consider whether Whiting's testimony at the bail hearing supplied the link of materiality which was missing earlier. We think that the District Court was well within its allowable discretion in denying a motion made only after considerable delay, Heflin v. United States, supra, and on "the eve of trial," United States v. Broker, supra at 329.

The defendant Sarnitz also asserts on this appeal that he was denied a fair trial by reason of prejudicial cross-examination concerning a prior conviction. We find this assertion without merit. Sarnitz denied upon direct examination that he had ever been convicted of a crime. Upon cross-examination, however, he admitted that he had been convicted of illegal trafficking in penicillin by a United States Military Government Court during the occupation of Austria in 1946. His contention on appeal is that this conviction was not admissible for impeachment purposes because it was not of a felony or a crime of moral turpitude. See United States v. Provoo, 215 F. 2d 531 (2d Cir. 1954). But the characterization of the 1946 conviction is not relevant to the disposition of Sarnitz' claim. Sarnitz admits in his brief that because he testified on his own behalf, "he could be cross-examined for the purpose of impeaching his credibility." Even more narrowly, because Sarnitz testified on direct examination that he had never been convicted of a crime, he made his credibility on that particular issue a relevant area for cross-examination. As this Court said in United States v. Colletti, 245 F. 2d 781, 782 (2d Cir. 1957):

> After testifying on direct examination that he had never been convicted of any "crime or offense," the government's attorney was allowed to show on his cross-examination that he had, while in the army, twice been convicted of what the appellant called "a fight assault." We need not determine whether this would otherwise have been proper cross-examination, see United States v. Provoo, 2 Cir., 215 F. 2d 531, 536, for it was permissible in contradiction of the appellant's previous testimony on the subject of his previous good conduct which he had himself put in issue.

Finally, the defendants contend that the Government's summation was inflammatory and prejudicial in alluding to bribery of political officials and commenting that "if that's

the way these Americans do business down in Latin American countries I think it is little wonder that we read in the papers these days of anti-American rioting in the streets down there." While we are not to be understood as sanctioning such latitudinous remarks, we do not believe that they were sufficiently prejudicial to require reversal.

We have considered the other arguments urged by the defendants and find them without merit.

We are indebted to assigned counsel for appellant Whiting for his painstaking preparation and presentation of appellant's contentions on this appeal.

Affirmed.

APPENDIX B

Constitutional Provisions

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

18 U.S.C. §371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *. June 24, 1948, c. 645, 62 Stat. 701.

Appendix B

18 U.S.C. §1343. *Fraud by wire, radio or television*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, §18(a) 66 Stat. 722, amended July 11, 1956, c. 561, 70 Stat. 523.